IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scott v. Canada (Attorney General),*
2013 BCSC 1651

Date: 20130906
Docket: S127611
Registry: Vancouver

Between:

Daniel Christopher Scott, Mark Douglas Campbell, Gavin Michael, David Flett, Kevin Albert Matthew Berry, Bradley Darren Quast, Aaron Michael Bedard

Plaintiffs

And:

The Attorney General of Canada

Defendant

Before: The Honourable Mr. Justice Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:	D. J. Sorochan, Q.C. K. Thompson R. E. K. Truman V. Ing
Counsel for the Defendant:	P. Vickery M. E. Tessier T. Henderson
Place and Date of Hearing:	Vancouver, B.C. July 22 - 24, 2013
Place and Date of Judgment:	Vancouver B.C. September 6, 2013

INTRODUCTION

[1] This action is about promises the Canadian Government made to men and women injured while in service to their country and whether it is obliged to fulfill those promises.

[2] The plaintiffs are members or former members of the Canadian Forces who were injured, physically or psychologically, in the course of duty.

[3] Injured veterans are entitled to claim benefits, assistance and compensation under federal legislation. Until 2006, the governing legislation was the *Pension Act,* R.S.C. 1985, c. P-6. On April 1, 2006, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act,* S.C. 2005, c. 21 came into force (which the plaintiffs refer to as the "New Veterans Charter" or "NVC").

[4] The NVC established, *inter alia*, a lump sum payment program for Canadian Forces members and veterans in lieu of disability pensions previously provided under the *Pension Act*.

[5] Each of the plaintiffs has received pension and other compensation from Veterans Affairs Canada pursuant to the provisions of the NVC. However they complain that the compensation provided under the provisions of the NVC is arbitrary, substandard and inadequate for supporting themselves and their families. They say their compensation and other benefits have been substantially reduced from what was formerly granted under the provisions of the *Pension Act*. Moreover they say they are being treated unequally because the benefits and compensation available under the NVC are substantially less favourable than those that are available to injured persons claiming under tort law or workers compensation laws.

[6] The plaintiffs assert the existence of a "Social Covenant" that gives rise to a fiduciary duty on the part of the federal government and invoke provisions of the *Canadian Charter of Rights and Freedoms* ("*Charter")*, specifically ss. 7, 15 and 24(1) in an effort to effect a remedy. They also frame their claim under the doctrine of the "Honour of the Crown", breach of a public duty, breach of their property rights

contrary to the *Canadian Bill of Rights*, S.C. 1960, c. 44, the *Charter* and the UN *Universal Declaration of Human Rights*, G.A. Res. 217(III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. Further, they make allegations with respect to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, the Table of Disabilities under the NVC and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[7] Counsel for the defendant concedes, for the purpose of this application, that the benefits and services formerly available to Canadian Forces members and veterans under the *Pension Act* were substantially better than those that are now available to them under the NVC.

[8] The plaintiffs filed this action as a proposed class proceeding. The action is in its early stages. The defendant has not yet filed its response to the notice of civil claim.

[9] The defendant applies pursuant to R. 9-5(1) of the *Supreme Court Civil Rules* for an order striking out the plaintiffs' claim in its entirety on the basis that it does not disclose a reasonable cause of action.

[10] Counsel for the defendant says that Canada brings this application not because Canada questions the service dedication and sacrifices of the Canadian Forces members and veterans but because the claim as presently framed has no chance of success. He stressed that Canada "acknowledges the gravity of the injuries suffered by many of the members of the proposed class". He maintains, however, that the object of the NVC is to ameliorate the effects of such injuries and that this action is not the appropriate vehicle for the expression of the plaintiffs' concerns.

[11] For the reasons that follow, the defendant's application is dismissed except in small part.

BACKGROUND

A. The Canadian Forces

[12] The Canadian Forces consists of:

a) the “Regular Force” comprised of officers and non-commissioned members enrolled for continuing, full-time military service;

b) the “Reserve Force”, comprised of officers and non-commissioned members enrolled for other than full-time military service; and

c) the “Special Force” established by the Governor-in-Council in consequence of any action undertaken by Canada under the UN Charter, the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party pursuant to s. 16(1) of the *National Defence Act*, R.S.C. 1985, c. N-5.

B. The NVC Benefit Regime

[13] The NVC empowers the Minister of Veterans Affairs to provide to eligible Canadian Forces members and veterans various benefits and services, including:

a) earnings loss benefits (s. 18(1));

b) permanent impairment allowance for veterans experiencing permanent and severe impairments in respect of physical or mental health problems (s. 38(1));

c) career transition services (s. 3(1));

d) rehabilitation services (s. 8(1));

e) clothing allowances (s. 60);

f) detention benefits (s. 64(1));

g) supplementary retirement benefits (s. 25(1)); and

h) income support benefits (for eligible veterans who received earnings loss benefit pursuant to s. 18 or would, but for their level of income, have received it) (s. 27).

[14] The NVC empowers the Minister to provide similar services and benefits to the spouses, common law partners and survivors of veterans and to enter into a contract for a group health insurance program and make contributions and premiums under the program (s. 66(1)(a)-(c)). The Minister may provide disability awards for eligible members and veterans who are suffering from a disability resulting from a service-related injury or disease, or a non-service related injury or disease that was aggravated by service (s. 45(1)). Disability awards may also be made in respect of loss, impairment or permanent loss of the use of paired organs or limbs where the member or veteran has received a disability award under s. 45 for the loss or permanent loss of the use of the other paired organ or limb (s. 47(1)).

[15] Like under the *Pension Act,* the assessment of the extent of a disability under the NVC is based upon the statutory instructions and a Table of Disabilities created by the Minister to guide the assessment.

[16] Prior to 2011, disability awards under the NVC were payable as a lump sum. The 2011 amendments now provide claimants with the option of annual payments (s. 52.1(1)(b)) subject to certain conditions.

TEST FOR STRIKING A CLAIM

[17] A claim will only be struck if, assuming the facts pleaded are true, it is plain and obvious that the pleadings disclose no reasonable cause of action. To put it another way, the claim has no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42, at para. 17.

[18] A plaintiff is not entitled to rely on the possibility that new facts may turn up as the case progresses. It is incumbent on the plaintiff to plead all of the facts upon which the claim is being made: *Imperial Tobacco*, at para. 22.

[19] Conclusions of law in the pleading that are not supported by the pleaded facts will be struck: *Young v. Borzoni,* 2007 BCCA 16 at para. 20; *Canadian Bar Association v. British Columbia*, 2008 BCCA 92 (leave to appeal refused [2008] S.C.C.A. No. 185) at para. 51.

[20] The court will be generous and will err on the side of permitting a novel but arguable claim to proceed to trial: *Imperial Tobacco*, at para. 21.

[21] No special consideration is given for class actions (*Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at para. 40), for *Charter* infringement claims (*Canadian Bar Association* at para 51) or for claims alleging the existence of a fiduciary duty (*Alberta v. Elder Advocates of Alberta* Society, 2011 SCC 24 at para. 60). Each claim must stand or fall on the pleadings.

ANALYSIS

A. Social Covenant and the Honour of the Crown

[22] For the purposes of this application, the following facts pleaded in the amended notice of civil claim are assumed to be true:

> 218. When members of the Canadian Forces put on the uniform of their country they make an extraordinary personal commitment to place the welfare of others ahead of their personal interests, to serve Canada before self and to put themselves at risk, as required, in the interests of the nation. A veteran, whether regular or reserve, active or retired, is someone who, at one point in their life, wrote a blank cheque made payable to "the Government of Canada," for an amount of "up to and including their life." This commitment to make the ultimate sacrifice reflects their honour in the service of their country.
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> 220. There is no equivalent profession to that of service in the Canadian Forces. Because of this extraordinary commitment, there is a long-recognized covenant that exists between the Canadian nation, the nation's people and those who hazard their lives in its service as members of the armed forces.
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> 221. This Social Covenant or Social Contract between Canada and those who serve it guarantees military members adequate recognition and benefit for the sacrifices they make and the service they render Canada is of paramount importance in a country that relies upon the voluntary recruitment of its youth to fill its military ranks.
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> 224. Members of the Canadian Forces are entitled to expect that if they sustain illness or injury in the line of duty, they will be taken care of by the

country they serve. If the Canadian Forces is to retain and reinforce the loyalty and commitment of its members and attract new recruits, Canadian forces policies must strive to ensure that such expectations are well met.

225. Canada's covenant to those who serve in the Canadian forces is based on the following principles:

a. that members have their service be treated with dignity and respect;

b. that members be assured of reasonable career progression;

c. that the members of the Canadian Forces are fairly and equitably compensated for the services they perform and the skills they exercise in performance of their many duties with compensation that properly takes into account the unique nature of military service;

d. that the members of the Canadian forces be provided with appropriate equipment and kit commensurate with their duties;

e. that all members and their families are provided with ready access to suitable and affordable accommodation which conform to modern standards and the reasonable expectations of those living in today's society;

f. that military personnel and their families be provided with access to a full and adequate range of support services, offered in both official languages, that will ensure their financial, physical and spiritual well-being;

g. that suitable care and compensation be provided to members, veterans and those injured in the service of Canada through programs and services required to meet the complex needs of individual members;

h. that military personnel and their families be provided with assistance in a seamless transition from military to civilian life;

i. that the guiding principle for the recognition, care and compensation must always be compassion; and

j. that Canada provides appropriate recognition and commemoration for the service and sacrifice of military personnel and their families.

227. As Canadian troops prepared for the Battle of Vimy Ridge in 1917, they were visited by the Prime Minister, Sir Robert Borden, who made this commitment on behalf of their country:

> "You can go into this action feeling assured of this, and as the head of the government I give you this assurance, that you need have no fear that the government and the country will fail to show just appreciation of your service to the country in what you are about to do and what you have already done. The government and the country will consider it their first duty to prove to the returned men its just and due appreciation of the inestimable value of the services rendered to the country and Empire; and that no man, whether he goes back or whether he remains in Flanders, will have just cause to reproach the government for having broken faith with the men who won and the men who died".

228. Later in 1917 the Borden's Unionist national unity Canadian government made a further solemn commitment to those in uniform that:

> "The men by whose sacrifice and endurance the free institutions of Canada will be preserved must be re-educated where necessary and re-established on the land or in such pursuits or vocations as they may desire to follow. The maimed and the broken will be protected, the widow and the orphan will be helped and cherished. Duty and decency demand that those who are saving democracy shall not find democracy a house of privilege, or a school of poverty and hardship."

229. Subsequently, Canadian veteran legislation included paragraphs reiterating the recognition by Canada of the Social Contract or Social Covenant and the obligation of the nation to be generous towards veterans and those who serve in the armed forces of the country. Examples are:

> *Pension Act,* R.S.C., 1985, c. P-6
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> Construction
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> 2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.
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> War Veterans Allowance Act, R.S.C., 1985, c. W-3
>
> Construction
>
> 1.01 The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled; and
>
> Veterans Review and Appeal Board Act, S.C. 1985, c. 18
>
> Construction
>
> 3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

234. The Social Covenant or Social Contract between Canada and those who serve has also been reflected in the representation of Canadian Forces recruiters who met with Class members prior to their enlistment, including representations that members of the Canadian Forces injured in their service would be fairly and adequately compensated, such compensation including adequate provision for return to civilian life and adequate provision for the maintenance of the Member's spouse and children. These representations

> were relied upon by Class members and were critical to the individual Class members' decision to join the Canadian Forces.
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> 236. Many Class members enlisted in the Canadian Forces at the time when the *Pension Act* governed their compensation for injuries and disabilities but later found that they were to be awarded much less compensation under the New Veterans Charter.
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> 237. The existence of a disability pension was an essential condition of the relationship between members and the Canadian Forces following enlistment, as evidenced by its inclusion as a term in the Conditions of Service.
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> 238. These Conditions of Service were unilaterally changed by Parliament with the enactment of the New Veterans Charter during a period at which Canada was at war sustaining heavy casualties and injuries.
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> 241. With respect to those who serve and have served Canada in the Canadian Forces at the risk of their lives, the Honour of the Crown is paramount because it is always assumed that the Crown intends to fulfill its promises, particularly promises such as the social covenant or contract between Canada and those who hazard their lives in its service.
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> [Underline Emphasis added]

[23] The foregoing assumed facts disclose a long standing and legislated recognition in Canada of the unique service and sacrifices of those who serve and have served in its armed forces. The Government of Canada represented to its armed forces its commitment to fairly and adequately compensate those members who were injured as well as their dependants. Indeed, the existence of a disability pension was an "essential condition of the relationship" following enlistment (amended notice of civil claim at para. 237).

[24] The plaintiffs argue that this long standing and legislated recognition amounts to a "Social Covenant" that, by virtue of the evolving legal doctrine known as the "Honour of the Crown", the defendant is honour bound to carry out.

[25] For the purposes of this application, the defendant accepts that the Crown made this Social Covenant but denies the assertion that it has failed to carry it out. The defendant points out the plaintiffs were content with the compensation and other benefits previously available under the *Pension Act* and it was only after the NVC was unanimously passed by all members of Parliament that the plaintiffs began to complain. It is therefore the change in government policy that is being attacked.

[26] In addition, the defendant points out that, in June 2010, the NVC was reviewed by the House of Commons Standing Committee on Veterans Affairs and was subsequently amended in October 2011 to provide for additional benefits as part of an ongoing attempt to improve the lot of veterans. Moreover, there is a statutory requirement for further comprehensive review that must be commenced before October 2013. The defendant submits that this is the proper vehicle for the review of any complaints the plaintiffs may have with the NVC, not a class action in the courts.

[27] The "Honour of the Crown" doctrine refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign: *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 65. It gives rise to different duties in different circumstances: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 18.

[28] In *Manitoba Métis Federation*, the Supreme Court of Canada stated that the Honour of the Crown is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled (para. 73). The case involved the allegation that the federal government breached its obligations owed to the Métis pursuant to the *Manitoba Act*. The Court concluded that s. 31 of the *Manitoba Act*, which provided for land grants to Métis children, created a constitutional obligation owed to the Métis and thereby engaged the Honour of the Crown. The government had promised that it would implement the s. 31 land grants in the most "effectual and equitable manner". The Court found the government failed to meet that promise and commented that a government sincerely intent on fulfilling the duty that its honour demanded "could and should have done better" (para. 128).

[29] The Honour of the Crown doctrine has been applied:

a. as giving rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest: *Haida Nation*, at para. 18

b. as informing the purposive interpretation of s. 35 of the *Charter* and giving rise to a duty to consult when the Crown contemplates an action that will affect a claimed by as of yet unproven Aboriginal interest: *Haida Nation*, at para. 25;

c. in respect of treaty-making and implementation: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para. 51; and

d. to require the Crown to act in a way that accomplishes the intended purpose of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, 1999 CanLII 665 (SCC) at para. 43.

[30] No Canadian court has applied the doctrine of the Honour of the Crown outside of the Aboriginal context, although it was referenced in the context of the sale of land: *Doe dem. Henderson v. Westover* (1852), 1 U.C.E. & A. 465 (U.C.C.E.A. at 468) and in the context of statutory interpretation: *R. v. Belleau* (1881), 7 S.C.R. 53 at 71 and *Windsor & Annapolis Railway Co. v. R*, (1885), 10 S.C.R. 335 at 371. It was also referenced in England in the context of a criminal prosecution: *R. v. Garside and Mosley* (1884) 2 AD. & E. 265 103 (K.B.) at p. 107: "We are not to presume that any promise made by the King even to the meanest and most criminal of his subjects will not be sacredly observed". These older decisions (two of which predate the Confederation of Canada) suggest that the Honour of the Crown doctrine has a lengthy history that extends beyond the Aboriginal context.

[31] The defendant argues that members of the armed forces do not have the same historical relationship with Canada that Aboriginal peoples do and that there is nothing analogous between the Aboriginal context and that of armed forces members. Moreover, it submits that the Honour of the Crown doctrine cannot be used to invalidate otherwise valid legislation. Parliament has the power to enact any law that falls within its legislative competence and is compliant with the *Charter.* It says that the remedy for those who believe that legislation is unjust or unfair lies in the ballot box.

[32] As applied to the unique circumstances of Canada's Aboriginal peoples, the Honour of the Crown mandates that the Crown is bound to honour the historical promises it made to them. In my view, it is not plain and obvious that the same principle could not be found to bind the Crown in respect of the historical promises it made to the members of the armed forces.

[33] Members of the Canadian Forces bear a unique relationship with the Crown insofar as they are required by law to face injury or death to carry out the orders of their military commanders in furtherance of the policies determined by the Government of Canada. Casualties are anticipated and planned for by superior officers. Canadian Forces members are given no choice. They must obey the orders of their superiors to go into battle or face severe military sanctions. Indeed, until 1998 when the *National Defence Act* was amended, the death penalty existed for several military offences such as showing cowardice before the enemy.

[34] In return for undertaking these onerous and often dangerous obligations, armed forces members were promised that they and their dependants would be fairly and adequately compensated.

[35] In *Manitoba Métis Federation*, the Supreme Court of Canada fashioned a new constitutional obligation derived from the Honour of the Crown albeit within the Aboriginal context. It appears to me that this doctrine may well be an evolving one. On the facts as pleaded, I cannot find it is plain and obvious that the Honour of the Crown doctrine could never be extended to impose an obligation on the Crown to fulfill the Social Covenant it made to its armed forces despite changes in government policy. It is conceivable that the promise to provide suitable and adequate care for the armed forces and their families meets the threshold of an overarching reconciliation of interests that engages the Honour of the Crown. The issue is an important one that is deserving of full inquiry and should appropriately be left for determination after a trial on the merits.

B. Public Law Duty

[36] The plaintiffs seek a declaration that, by virtue of the unique relationship between the Crown and the Canadian Forces members and veterans, the Crown owes them a public law duty to exercise its legislative functions in a manner that is consistent with the Social Covenant. They also seek a declaration that the defendant has breached that duty.

[37] The defendant submits the Supreme Court of Canada has repeatedly held that no cause of action can be founded upon a breach of a public law duty and that a breach of a public law duty is unknown in law, relying on *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225, *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 49 and *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 at 35. On this basis, the defendant argues the plaintiffs' claims in this regard should be struck.

[38] None of those decisions support the bold proposition put forward by the defendant. In *Saskatchewan Wheat Pool*, the issue was whether a breach of a statutory duty gave rise to a civil cause of action. In *Pasiechnyk*, the issue was whether a civil action against the government alleging it failed to meet its duties under the Saskatchewan *Occupational Health and Safety Act* was barred by the Saskatchewan *Workers' Compensation Act*. In *Kamloops*, the issue was whether pure economic loss was recoverable against a negligent building inspector.

[39] The defendant also relies on the decision of this court in *Bingo City Games Inc. v. BC Lottery Corp.*, 2003 BCSC 637. There, the plaintiffs claimed that the British Columbia Lottery Corp. was in breach of its "public duty of care" when it divested charities of their responsibilities to manage bingo operations. The pleading in support of that assertion stated:

> 52. The defendants and each of them have a public law duty of care to conduct business, or to act, in furtherance of the creation of or implementation of public policy, in a reasonable manner, bona fide in the exercise of statutory authority, and not to act unlawfully or contrary to the public interest, or in a manner which abuses the public confidence or trust.

> 53. The defendants and each of them, breached their public law duty of care in the conduct of business or in their actions in furtherance of public policy, by acting unreasonably, without regard to bona fides, in the exercise of purported exercise of statutory authority, by acting unlawfully or contrary to the public interest, or in a manner which breached public confidence or trust, by imposing the BOSA unlawfully, by approving the BCA relocation negligently or contrary to the law, by making negligent misrepresentations and by abusing economic power in their dealings with the Plaintiff BCG.

[40] No authority was provided in support of a cause of action founded on a "breach of public law duty" and the court concluded "there is no such beast" (para. 56). It struck the claims on that basis and also because they were an unnecessary "exercise in rhetoric" (para. 57).

[41] In order to establish the existence of a duty of care, the plaintiff must prove that :

> i. the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff, creating a *prima facie* duty; and
>
> ii. there are no residual policy concerns that ought to negate or limit that duty of care.

Hill v. Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41 at para. 20

[42] A duty of care may also arise by way of precedent. The courts have developed "categories" where specific types of relationships are recognized as giving rise to a duty of care.

[43] I am unaware of any authority recognizing the existence of a "public" duty of care between veterans and members of the Canadian Forces and the Crown and none was provided to me. This is not surprising given that an argument for a public duty of care fails on both stages of the duty of care analysis, in view of the reasons of the Supreme Court of Canada in *Imperial Tobacco*.

[44] Imperial Tobacco was a defendant in two actions, one involving a claim by the British Columbia government seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses and the other

involving a class action brought by consumers of light or mild cigarettes for the misleading nature of their packaging. Imperial Tobacco commenced third party proceedings against the federal Crown, alleging that it negligently misrepresented the health attributes of low-tar cigarettes to consumers and was therefore liable to Imperial Tobacco on the basis of contribution and indemnity pursuant to the *Negligence Act*. It further alleged the federal Crown negligently misrepresented the health attributes of low-tar cigarettes to tobacco companies and on that basis was liable to those companies in the event of their loss in the two actions. The federal Crown successfully applied to strike the negligent misrepresentation claims. The decision was overturned by the British Columbia Court of Appeal.

[45] McLachlin C.J.C., writing for the Court, first considered whether the facts as pleaded brought either claim within a recognized duty of care category. She concluded there was no example of a government being held liable for negligent misrepresentation to an industry.

[46] McLachlin C.J.C. then considered whether a duty of care nevertheless existed on the basis of the two-stage test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), which was adopted into Canadian law in *Cooper v. Hobart*, 2001 SCC 79 at paras. 25, 29 - 39.

[47] On the proximity stage of the analysis, McLachlin C.J.C. found that no *prima facie* duty of care existed with respect to the class members. Sufficient proximity between a person and government can only be found in circumstances where there is a statutory scheme giving rise to this duty of care, either expressly or by implication, or by way of specific interactions between the claimant and government (and the duty is not negated by statute) (para. 43).

[48] McLachlin C.J.C. noted that, as there were no specific interactions between Canada and members of the class proceeding, the duty of care could only arise by way of governing statutes (para. 49). She found that the relevant statutes established only general duties to the public, and no private law duties to particular consumers (para. 50). In regard to those statutes, she cited from Mr. Justice

Sharpe's reasons in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411 (O.N.C.A.) at para. 17:

> I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals.

[49] However, McLachlin C.J.C. did find there was sufficient proximity between the federal Crown and the tobacco companies to find a *prima facie* duty of care: the representations had been specifically made to these manufacturers in the course of Health Canada's regulatory and other activities (para. 55).

[50] In any event, on the second stage of the analysis, McLachlin C.J.C. found that there were policy concerns to justify negating the existence of a duty of care between the federal government and the tobacco companies. She found the representations made to the tobacco companies were matters of government policy. "Core" government policy decisions are not justiciable and cannot give rise to tort liability, as opposed to operational decisions (para. 85). Core policy decisions are decisions made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. McLachlin C.J.C. further held at para. 87:

> The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

[51] I note that operational decisions were defined in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 as the implementation of policy decisions (see paras. 18 and 19). McLachlin C.J.C. attempted to do away with the ambiguity arising from this attempt to distinguish between policy and operational decisions by focusing her analysis upon defining "core" policy decisions in *Imperial Tobacco*.

[52] It is clear from *Imperial Tobacco* that a cause of action based on a "public duty of care" does not exist. There can only be a private duty of care imposed on a public authority. Proximity will be established by way of a statutory provision giving

rise to a private duty of care or by way of specific interactions between the parties, such that the harm arising from a negligent act would be foreseeable to the public authority. Further the government's decision must come within the realm of operational decisions.

[53] The government may, in certain circumstances, be found to owe a duty of care; it is not immune from the law of negligence. However, as stated in Allen Linden and Bruce Feldthusen's text, *Canadian Tort Law*, 9th ed. (Markham: LexisNexis Canada, 2011) at 660, "the Crown may only be liable in tort to the extent that it consents to be so." The reason for this limitation on liability with respect to public authorities is obvious: public authorities enjoy unique powers that are distinct from the circumstances of private citizens.

[54] A duty of care will only be found in specific circumstances that are analogous to the relationship between private citizens. In this way, the duty of care is properly characterized as private, rather than public. To characterize it otherwise would be to expose the government to expansive liability. It would also conflict with its obligation to act in the best interest of society as a whole, which requires that it balance different (even competing) interests. This is precisely why the courts have instructed that no duty of care will be found when the government is making a policy decision.

[55] In my view, it is plain and obvious that a cause of action grounded in a public duty of care has no prospect of success and is bound to fail on the proximity stage of the *Anns*/*Cooper* analysis.

[56] However, I am bound to consider the defendant's application on the basis of the pleadings as they stand or might be amended: *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.) at 68. The plaintiffs may amend their claim to plead that the defendant owed them a private law duty of care to recognize and give effect to the Social Covenant. In light of my findings with respect to the *CLPA* set out below, it is not plain and obvious that s. 9 would bar such a claim.

C. Fiduciary Duty

[57] The Supreme Court of Canada has recently made it clear that the range of cases in which a fiduciary duty on the government is found will be limited and that plaintiffs suing for breach of such a duty must be prepared to have their claims tested at the pleadings stage: *Elder Advocates* at para. 54.

[58] Here the plaintiffs allege that:

> 249. Where, as is the case with those who serve and have served, including the Plaintiffs and proposed Class members, the Crown has assumed discretionary control over specific interest, the Honour of the Crown gives rise to a fiduciary duty in relation to specific interests flowing from their service to the country.
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> 250. The fiduciary duty arising from the Honour of the Crown requires the Crown to keep the promises that Canada has made in its Social Covenant of Social Contract with those who serve.
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> 351. To the extent that ministerial discretion is validly granted to the Minister, the Plaintiffs plead that because of the unique power that the Minister and Defendant exercises with respect to the Class members, and the peculiar vulnerability of the Class members, the Defendants [sic] owe a duty to the Class to avoid conflicts of interest and to act in the best interests of the Class and plead that each of the Class members stands in a relationship of trust and confidence with the Minister and the Defendant.
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> 352. The Defendant at all times knew, or ought to have known, that the Class members were relying upon them to care for them, to protect their right and entitlement to the services and benefits required by Canada's covenant to those who serve in the Canadian Forces and the Honour of the Crown, and to act in their best interests.
>
> 353. By virtue of this relationship of trust and confidence, the Defendant owes a fiduciary duty to the Class members.

[59] The question is whether this pleading, in the context of the facts pleaded in the amended notice of civil claim as a whole, discloses a supportable cause of action.

[60] The leading authority on fiduciary duty claims against public authorities is *Elder Advocates*. The Supreme Court of Canada clarified when the law imposes an *ad hoc* fiduciary duty upon the Crown. The plaintiffs were a large group of elderly residents of Alberta's long-term care facilities. They alleged the government had artificially inflated the accommodation charges to the residents in order to subsidize

the medical expense costs which were the responsibility of the government. The government applied to strike the various claims, including a claim for breach of fiduciary duty.

[61] The Supreme Court of Canada summarized the general requirements for imposition of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized at para 36:

> a) vulnerability arising from the relationship (established by way of the *Frame v. Smith*, [1987] 2 S.C.R. 99 test):
>
> i. the alleged fiduciary has scope for the exercise of some discretion or power;
>
> ii. the alleged fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
>
> iii. the alleged beneficiary is peculiarly vulnerable to or at the mercy of the alleged fiduciary holding the discretion or power;
>
> b) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
>
> c) a defined person or class of persons vulnerable to a fiduciary's control; and
>
> d) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion.

a) Vulnerability

[62] In my view, it is not plain and obvious that the plaintiffs will be unable to demonstrate the three hallmarks of vulnerability, as set out above. The Crown has wide scope for the exercise of discretion and power over the interests of Canadian Forces members and veterans.

b) An Undertaking

[63] A fiduciary duty may arise from an undertaking to act in the best interests of the alleged beneficiary whose legal or practical interests are vulnerable to the alleged fiduciary's control: *Manitoba Metis Federation*, at para. 50.

[64] The Supreme Court of Canada noted in *Elder Advocates* that the existence and character of the undertaking are informed by the norms relating to the particular

relationship. However, the Court also found that "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake" (para. 31).

[65] The duty in question is one of utmost loyalty to the beneficiary. Where a government is exercising its power or discretion, the circumstances in which it will be found to have undertaken to act in the best interests of the alleged beneficiary will be extremely rare (*Elder Advocates*, paras. 42 and 43). As noted by the Court, the duty is particularly difficult to prove in relation to the Crown as it is the Crown's duty to act in the best interests of society as a whole (*Elder Advocates*, para. 44). If the undertaking allegedly flows from statute, the language in the legislation must clearly support it. It may also flow from the nature of the parties' relationship and should be determined by focussing on analogous cases (*Elder Advocates*, paras. 45 - 46).

[66] Notwithstanding the foregoing, in my view, it is not plain and obvious that the plaintiffs will be unable to demonstrate the Crown gave an undertaking of utmost loyalty and responsibility, express or implied, to ensure that Canadian Forces members and veterans would be provided suitable and adequate care and compensation for their service to their county. That undertaking was first made by Prime Minister Borden on behalf of the country as Canadian troops prepared for the Battle of Vimy Ridge in 1917 and was repeated and perpetuated in subsequent statements in Parliament, Royal Commissions, Reports of Standing Committees and legislation.

[67] The assumed facts arguably disclose that the Crown solemnly undertook to act in the best interests of injured veterans upon their return from battle even if it meant putting veterans' interests before those of the Crown and its citizens. That makes sense when one considers that it is the Canadian Forces members and veterans who fought and in many cases died and continue to fight and die for the freedom of all Canadians and the fundamental principles that all Canadian citizens treasure.

c) A Defined Person or Class of Persons

[68] The Canadian Forces members and veterans injured during service clearly meet the test of a defined person or class of persons.

d) A Legal or Substantial Practical Interest that Stands to be Adversely Affected by the Alleged Fiduciary's Exercise of Discretion

[69] The Supreme Court of Canada in *Elder Advocates* made it clear that access to a benefit scheme without more will not constitute an interest giving rise to a fiduciary duty. Such a benefit is a creation of public law and is subject to the government's public law obligations in the administration of the scheme (para 52). The degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest (para 53).

[70] The specific fiduciary duty that the plaintiffs seek to establish is not about the legislation of a benefit and service scheme for injured armed forces members and veterans. Rather, it encompasses an overarching obligation on the part of the Crown to keep the promises it made to them that, in return for their services and sacrifices, the government would ensure that they and their dependents received adequate services, assistance and compensation should they become injured or die.

[71] I disagree with the defendant's submissions that the plaintiffs have failed to articulate a specific interest being affected. The interest that is affected, as pleaded, is an injured veteran's ability to meaningfully survive after discharge. While I accept that imposing a fiduciary duty on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, I do not accept that, in the circumstances of this case, it is plain and obvious a court will decide a fiduciary duty cannot exist.

[72] Clearly, veterans' specific interests to meaningfully survive were and are vulnerable to the Crown's control. In the words of plaintiffs' counsel they are "left to the whim of the Crown's veterans' disability pension scheme".

[73] There are several examples of the courts refusing to strike claims against the Crown alleging breach of fiduciary duty in the context of veterans.

[74] In *Duplessis v. Canada* (2000), 197 FTR 87 (affirmed 2001 FCT 1038), a Canadian Forces veteran suffering from post-traumatic stress disorder claimed that the callous and arbitrary treatment he received upon his return from active duty overseas amounted, *inter alia*, to a breach by the government of its fiduciary duty owed to him. The Court held that there was a serious question of law as to whether or not a fiduciary duty existed. That question was more appropriately left for determination at a trial on the merits (para. 31).

[75] In *Cross v. Sullivan*, 2003 CanLII 44082 (OSC), the plaintiff was a former Canadian Forces member who filed a successful grievance regarding alleged deficiencies in his performance. He alleged that members of the military had conspired against him in respect of the unfavourable assessments of his performance. He sought leave to amend his statement of claim to allege, *inter alia*, breach by the Crown of its fiduciary duty owed to him. After reviewing the decision in *Duplessis*, the court allowed the application, stating:

> [23] The Crown has given no legal authority which deals with the relationship or possibly the special relationship between a member of the Armed Forces and the Crown and the Armed Forces.
>
> [24] In these circumstances, I conclude that it is not beyond all doubt that the claim is clearly impossible to success.

[76] In *Stopford v. Canada*, 2001 FCT 887, the plaintiff was a member of the Canadian Forces and had served in a number of overseas locations. In the course of his duties in Croatia, he was exposed to hazardous materials. Upon his return to Canada, he began exhibiting symptoms that eventually led to his discharge from duty as he was determined to be medically unfit. He claimed that Canada had breached a fiduciary duty owed to him by the manner in which his disability claim was handled. The court noted that the categories giving rise to a fiduciary duty remained open (para. 26). The court further noted Mr. Justice Dickson's attempt in *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 384 - 385 (para. 27) to articulate a broad

definition of fiduciary duty based on the nature of the relationship at issue and not the actors involved. The court concluded that it was not plain and obvious the claim would fail (para. 31).

[77] Counsel for the defendant submits that, even assuming a fiduciary duty could exist in the circumstances outlined in the plaintiffs' pleadings, no facts have been pleaded to support a finding that the defendant breached that duty.

[78] The amended notice of civil claim pleads, *inter alia*, that:

> a) injured Canadian Forces members and veterans "have been provided with a total financial compensation package [under] the New Veterans Charter that is insufficient to maintain a normal lifestyle for those of similar employment background in Canadian society" (para. 339);
>
> b) members of the class who are Reserve Force members recently injured in Afghanistan are not adequately compensated for their life-time reduction in earning capacity (para. 340); and
>
> c) the NVC arbitrarily assesses disabilities and artificially caps financial recovery of catastrophically injured members: (para. 349)

[79] The issue in this case is whether Parliament, in passing the NVC and in the face of its admitted Social Covenant and undertaking to sufficiently provide for injured veterans, can do otherwise in furtherance of a change in government policy. That issue is worthy of a full trial on the merits.

D. *Charter* - s. 15(1)

[80] Section 15(1) of the *Charter* provides:

> 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[81] The plaintiffs allege at para. 391 of the amended notice of civil claim that the "arbitrary, sub-standard and inadequate support and compensation scheme(s) established by the defendant under the New Veterans Charter violate the equality rights of the plaintiffs and the class protected under s. 15 of the *Canadian Charter of*

Rights and Freedoms in a manner that is inconsistent with the principles of fundamental justice".

[82] The parties agree that, in order to succeed on this aspect of their claim, the plaintiffs must establish that (a) the law in question creates an adverse distinction based on an enumerated or an analogous ground and (b) the impact of the distinction perpetuates disadvantage, prejudice or stereotyping: *Quebec (Attorney General) v. A*, 2013 SCC 5 at para 324. Whether or not the plaintiffs succeed will be determined on the basis of a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage because of their membership in an enumerated or analogous ground: *Quebec v. A.* at para. 331. For the purpose of this application, I must determine whether the pleadings, accepted as true, disclose a reasonable cause of action, considering these requirements succinctly set out in *Quebec v. A*.

(a) Does the NVC Create a Distinction Based on an Analogous Ground?

[83] The defendant argues that the plaintiffs' claim is devoid of any plea of material facts that would support this aspect of the *Quebec v. A.* test. It points out that basing a s. 15 *Charter* claim on a temporal distinction, as the plaintiffs appear to do in contrasting their treatment under the NVC with the treatment of Canadian Forces members and veterans who were disabled during their military service prior to April 1, 2006 and who are entitled to benefits pursuant to the *Pension Act*, is fatal. As noted by Professor Hogg in his text *Constitutional Law in Canada*, 5th ed. (supp), loose-leaf (Toronto: Carswell, 2012) at p. 55-25:

> "…every change in the law creates a distinction between those who were governed by the law before the change and those who are governed by the new law, but this is not discrimination under s. 15, because a *temporal* distinction is not an analogous ground."
>
> [Emphasis in original]

[84] The defendant further notes that the plaintiffs attempt to compare themselves with claimants who may sue in tort or claim benefits under provincial workers' compensation schemes, thereby basing their s.15 *Charter* claim on the "forum" for

compensation, which is clearly not an enumerated or analogous ground. It argues that government is entitled to create different regimes that provide different benefits designed to address different needs and vary eligibility rules and, potentially, vary amounts of compensation. It relies on the Ontario Superior Court decision in *Wareham v. Ontario (Minister of Community and Social Services)*, (2008), 166 C.R.R. (2d) 162 (O.N.S.C.) which held that creating different public benefit regimes entailing different access rules does not amount to discrimination under the *Charter*. The Ontario Court of Appeal upheld the motion judge's decision to strike the statement of claim with respect to the s. 15 claim (2008 ONCA 771).

[85] The plaintiffs' case is that they are being denied a benefit that is available to all other injured Canadians, namely the availability of adequate compensation for their work-related injuries. They acknowledge that the courts have not yet recognized employment status as analogous to the enumerated grounds under s. 15(1). However, they submit there is an arguable case that their status as Canadian Forces members and veterans is an analogous ground and that the NVC creates an adverse distinction based upon that status. They point to the Supreme Court of Canada's decision in *R. v. Généreux*, [1992] 1 S.C.R. 259, as support for their argument that employment in the Canadian Forces may be determined to be an analogous ground in certain circumstances.

[86] In *Généreux,* Mr. Justice Lamer, writing for the majority, stated, in *obiter* at 310 - 311:

> The appellant sought as well to rely on s. 15 of the *Charter.* I think that this submission equally can be dealt with briefly. In my opinion, the appellant, in the context of this appeal, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the *Charter*: *Andrews v. Law Society of British Columbia, supra*. For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in s. 15(1), or one analogous thereto.
>
> *I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the Charter. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of*

> *the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances.* However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the *Charter*.
>
> [Emphasis added]

[87] More recently, the Supreme Court of Canada in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, at para. 116, left open the possibility that occupational status could be an analogous ground.

[88] When a person becomes a member of the Canadian Forces, he or she is bound to serve until lawfully released: *National Defence Act*, s. 23. This imposes a legal obligation upon Canadian Forces members that is unlike that upon members of civilian society. Civilians who decide to quit their job may face the prospect of loss of employment or threat of legal action for breach of contract. In contrast, Canadian Forces members who abandon or fail to report for duty face far more serious repercussions including imprisonment, potentially for life: *National Defence Act*, ss. 88 and 90.

[89] The plaintiffs argue there is no requirement that they specifically identify a comparator group against whom their treatment under the NVC is contrasted, citing Professor Hogg's text at 55-34.4:

> In *Withler v. Canada* (2011), the Court suddenly resiled from its insistence on finding a precise comparator group to which the claimant's position was to be compared…the Court was obviously signaling a concern about their reasoning in *Hodge* and *Auton*, where 'the definition of the comparator group determines the analysis and the outcome.

[90] I agree with the plaintiffs. It is not plain and obvious that status as a Canadian Forces member or veteran injured while serving Canada's interests would never be found to constitute a class of persons analogous to those enumerated in s. 15(1). Moreover, on the facts as pleaded, it is not plain and obvious that the effect of the NVC does not impose a differential treatment on injured members and veterans compared to other Canadians who are injured on the job.

(b) Does the Distinction Perpetuate Disadvantage, Prejudice or Stereotyping?

[91] The defendant submits that there are no pleaded facts capable of supporting a finding of discrimination on the basis of the perpetuation of prejudice or stereotyping.

[92] The plaintiffs say that the facts pleaded establish that the NVC perpetuates arbitrary disadvantage.

[93] In *Québec v. A,* Madam Justice Abella, writing the majority reasons on s. 15(1) of the *Charter*, framed the appropriate approach to the second stage of the s. 15(1) analysis as follows:

> [325] In referring to prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. *Withler* is clear that "[a]t the end of the day there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?" (para. 2 (emphasis added)). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate, as Professor Sophia Moreau explains:
>
> > Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society.
> >
> > ("*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 *Ottawa L. Rev.* 283, at p. 292)
>
> […]
>
> [327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. In explaining prejudice in *Withler*, the Court said: "[W]ithout attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice

> against the claimant group, as well as the nature of the interest that is affected, will be considered" (para. 38).
>
> [328] It is the discriminatory *conduct* that s. 15 seeks to prevent, not the underlying attitude or motive, as Dickson C.J. explained in *Action Travail*:
>
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. [p. 1139, citing the Report of the Commission on Equality in Employment (1984).]
>
> This was reiterated in *Withler*, where the Court said: "[W]hether the s. 15 analysis focusses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the *negative impact* of the law on them" (para. 37 (emphasis added)).
>
> […]
>
> [330] Requiring claimants, therefore, to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant, not to mention ineffable burden.
>
> [331] *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. As *Withler* makes clear, the contextual factors will vary from case to case — there is no "rigid template":
>
> > The particular contextual factors relevant to the substantive equality inquiry at the second step [of the Andrews test] will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: Kapp. Factors such as those developed in Law — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected— may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory. . . . [Emphasis added; para. 66.]
>
> [Emphasis in original]

[94] McLachlin C.J.C. concurred in the reasons delivered by Abella J., emphasizing that, while prejudice and stereotyping are useful indicia, they are not determinative:

> [418] Most recently, this Court has articulated the approach in terms of two steps: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or false stereotyping? : *Kapp*, at para. 17; *Withler*, at para. 30. While the promotion or the perpetuation of prejudice, on the one

> hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected: *Withler*, at para. 38; *Kapp*, at para. 19.

[95] Given those statements from the Supreme Court of Canada and its clarification of the more expansive approach it has adopted in the second stage of the s. 15(1) *Charter* analysis, it is not plain and obvious the NVC could not be found to violate the norm of substantive equality through its treatment of injured Canadian Forces members and veterans in contrast with other injured Canadian workers. Although it may well be difficult for the plaintiffs to demonstrate the perpetuation of prejudice or stereotyping, it is premature at this stage of the proceeding to rule out the possibility that they will be able to demonstrate a distinction that perpetuates disadvantage.

E. *Charter* - s. 7

[96] Section 7 of the *Charter* provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[97] The plaintiffs plead that:

> 339. Since the enactment of the New Veterans Charter, members of the Class have been terminated in their employment and forced out of their income source as members in the Canadian Forces, have been unable to find meaningful employment, and have been provided with a total financial compensation package [sic] the New Veterans Charter that is insufficient to maintain a normal lifestyle for those of similar employment background in Canadian society.
>
> […]
>
> 390…the arbitrary, sub-standard and inadequate support and compensation schemes(s) established by the Defendant for the Plaintiffs, their families and for the Class in the New Veterans Charter violate s. 7 of the *Canadian Charter of Rights and Freedoms* in depriving the Plaintiffs and the Class with the right to life, liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice.

[98] The plaintiffs argue that the NVC deprives them of their right to security of the person in that it:

> a) fails to provide adequate compensation for their injuries sustained in the service of Canada, despite assurances that they would be so compensated; and
>
> b) causes them serious state imposed psychological distress resulting from its application.

[99] They say that these deprivations do not accord with the principles of fundamental justice, namely the Honour of the Crown, the government's obligation to fulfill its promises, the government's fiduciary duties and the principle that laws should not be arbitrary.

(a) Fails to Provide Adequate Compensation

[100] The defendant argues that the plaintiffs seek to increase the amount of benefits they are entitled to receive; they do not seek to eliminate a deprivation. In other words, they seek to impose a positive obligation on the government that has never before been recognized under s. 7 of the *Charter*: *Pratten v. British Columbia (Attorney General)*, 2012 BCCA 480 (leave to appeal refused [2013] S.C.C.A. No. 36) at para. 46.

[101] The defendant also submits that the plaintiffs have not been "deprived" of anything. Rather, it says the NVC confers benefits on them by way of services, assistance and compensation. It relies on the following statement by McLachlin C.J.C. in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para. 81:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right <u>not to be deprived</u> of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to <u>deprive</u> people of these. Such a deprivation does not exist in the case at bar.
>
> [Emphasis in original]

[102] The defendant submits it is clear that the plaintiffs seek to protect a pure economic interest: the amount of compensation to which they are entitled if injured in service. It argues that there is no jurisprudence suggesting s. 7 of the *Charter* encompasses economic rights or creates positive obligations on the state to ensure each person enjoys life, liberty and security of the person. Rather, s. 7 protects against state interference with a person's ability to make essential life choices: *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para 45.

[103] The plaintiffs acknowledge that their claim, in essence, asserts economic rights and that s. 7 has not been extended to the protection of economic interests, but submit the courts have left open the possibility of s. 7 being extended to embrace such rights. In *Melanson v. New Brunswick (Attorney General)*, 2007 NBCA 12, Mr. Justice Robertson observed that:

> [20] To date the Supreme Court has not extended the protection afforded by s. 7 of the *Charter* to cases involving economic or proprietary rights. However, so far as economic interests are concerned, the Supreme Court has not ruled out the possibility that, in future, s. 7 may be extended to embrace such interests. In *Gosselin* it was argued that s. 7 imposes a positive obligation on a government to provide adequate welfare benefits to the poor. While the argument was rejected, the majority of the Court acknowledged that although s. 7 had yet to be extended to economic rights or to rights wholly unconnected with the administration of justice, those facts did not foreclose the possibility that, in future, s. 7 might be given a more expansive interpretation. However, the majority concluded that *Gosselin* was not the case for advancing the law because the evidence of "actual hardship" was wanting.

[104] I agree with counsel for the defendant that a scheme providing benefits cannot be said to amount to a deprivation merely because the claimant views the benefits as insufficient. However, I do not agree with the defendant's submission that s. 7 could not be interpreted in the circumstances here to encompass positive obligations on the state. The Supreme Court of Canada has acknowledged that one day it may be so interpreted: *Gosselin* at para. 82. It is arguable that the unique interactions between the Crown and its armed forces create the "special circumstances" necessary to give rise to a finding that s. 7 includes a positive obligation to protect the security of the plaintiffs' persons.

[105] I also disagree that an argument based upon s. 7 being extended to include economic interests is bound to fail. The plaintiffs have been injured, disabled and are in need of adequate economic assistance as a result of their military service. They are in a unique relationship with the government. As can be observed from *Melanson*, the door has been left open by the courts for such an argument to succeed.

[106] The Supreme Court of Canada in *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, at para. 193, held that courts should proceed cautiously in dealing with s. 7 *Charter* claims:

> [193] Section 7 gives rise to some of the most difficult issues in *Canadian Charter* litigation. Because s. 7 protects the most basic interests of human beings — life, liberty and security — claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society's conception of "principles of fundamental justice" as to be constitutionally entrenched.

[107] It is inconsistent with a cautious and incremental approach to strike the plaintiff's s. 7 claim at this stage of the proceedings.

[108] In my view, it is not plain and obvious that the plaintiff's claim that the NVC fails to provide adequate compensation to injured Canadian Forces members and veterans, thereby depriving them of their right to security of the person, has no reasonable prospect of success. The plaintiffs should be entitled to develop their case upon a full record.

(b) The NVC Causes Serious Psychological Stress

[109] Section. 7 of the *Charter* will be engaged where an individual's psychological integrity is seriously harmed by an action of the state: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at para. 57.

[110] The plaintiffs allege that, despite the promises made to them in the form of the Social Covenant, the government acted unilaterally to diminish the benefits they would have otherwise received after April 1, 2006. This legislative change occurred

during the Afghanistan war when the armed forces had no choice but to continue serving their country and believed they would continue to receive benefits under the *Pension Act*. They say that they legitimately believed the government would honour its Social Covenant. The economic strain that has now been placed upon them as a consequence of the NVC creates enormous stress and feelings of betrayal and abandonment.

[111] The plaintiff, Major Mark Campbell is one example. After 32 years of military service, Mr. Campbell suffered the loss of both legs as well as other injuries. He also experienced severe mental health injuries initially caused by his physical injuries and later perpetuated by his feelings of betrayal and abandonment by the Canadian Forces, Veterans Affairs Canada and the government: amended notice of civil claim para. 104.

[112] In my view, it is not plain and obvious that the plaintiffs' s. 7 *Charter* claim in respect of serious state imposed psychological distress will fail.

(c) Principles of Fundamental Justice

[113] Section 7 of the *Charter* provides that a person's protected rights may not be deprived except if such deprivation is in accordance with the principles of fundamental justice.

[114] The defendant submits that the plaintiffs have not identified any principle of fundamental justice that has been violated. It argues that no material facts have been pleaded in support of the claim that the deprivation is arbitrary, noting the three-step analysis affirmed in *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (affirmed 2011 SCC 44) at para. 275 for establishing arbitrariness:

i. what is the "state interest" sought to be protected;
ii. what is the relationship between the "state interest" identified and the impugned legislation and
iii. has the claimant established that the impugned legislation bears no relation to or is inconsistent with the state interest?

[115] The defendant says the plaintiffs' use of the term "arbitrary" in their pleadings does not meet the requirements set out in *PHS Community Services.* Specifically, there are no material facts pleaded to support the requirement that they show the NVC bears no relation to or is inconsistent with Canada's interest to compensate injured Canadian Forces' members and veterans.

[116] The defendant submits that upper limits on court awarded damages are by their very nature arbitrary and that the setting of a cap is a policy decision within the purview of Parliament that has repeatedly withstood the scrutiny of the courts: *Lee v. Dawson*, 2006 BCCA 159 (leave to appeal refused [2006] S.C.C.A. No. 192; *Morrow v. Zhang*, 2009 ABCA 215 (leave to appeal refused [2009] S.C.C.A. No. 341) and *Hartling v. Nova Scotia Attorney General)*, 2009 NSCA 130 (leave to appeal refused [2010] S.C.C.A. No. 63).

[117] The plaintiffs submit that the recognized obligation on the part of the government to provide adequate compensation to its injured armed forces members and veterans is an essential principle of fundamental justice that requires recognition by the courts.

[118] The plaintiffs also submit it is a principle of fundamental justice that laws not be arbitrary: *Chaoulli*, at paras. 129-131. They argue that the NVC arbitrarily limits their respective rights to security of the person by placing caps on compensation for injuries and aggregating all injuries regardless of the number of events that led to them. They say that the NVC is inconsistent with the objective that lies behind it, namely the government's obligation to adequately compensate injured Canadian Forces members and veterans.

[119] As examples, the plaintiffs point to the fact that Bombardier Daniel Scott received 0% disability rating for the loss of his spleen and Master Corporal Gavin Flett received 0% disability rating for a left femur fracture. They say that such treatment is arbitrary and not in accordance with the principles of fundamental justice.

[120] The plaintiffs distinguish the cap imposed by the NVC with that imposed in tort law for non-pecuniary damages. The latter is intended to provide solace to the injured plaintiff and is not dependent solely upon the severity of the injury: *Lee* at para. 70. In contrast, the NVC is intended to provide compensation and services to support the ongoing survival of the injured Canadian Forces member or veteran.

[121] In my view, it is not plain and obvious that the plaintiffs' s. 7 *Charter* arguments are bound to fail. The principles of fundamental justice are shaped by the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 8. I am not persuaded that the basic norms by which Canada deals with its veterans do not include adequate compensation for their injuries.

[122] In the circumstances, it is appropriate that they be determined by the court on their merits taking into account the full factual context as may be developed.

F. *Charter* - s. 24(1)

[123] The plaintiffs claim:

> 387(g). all necessary orders pursuant to section 24(1) of the *Constitution Act, 1982* or otherwise under common law or equitable principles required to remedy the breaches of section 15 of the *Charter* affecting the Plaintiffs and members of the Class;
>
> 387(i). all necessary orders pursuant to section 24(1) of the *Constitution Act, 1982* or otherwise under common law or equitable principles required to remedy the breaches of section 7 of the *Charter* affecting the Plaintiffs and members of the Class;
>
> 287(k). an order pursuant to section 24(1) of the *Constitution Act, 1982* or otherwise under common law or equitable principles, that the Plaintiffs and the Class members be paid the difference between the amount paid under the New Veterans Charter and the amounts that would have been paid for analogous injuries in awards by the courts in Canada or in the alternative, under workers' compensation schemes.

[124] Section 24(1) of the *Charter* provides that:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[125] Section 24(1) is invoked as a remedy for government acts under valid legislation that violate *Charter* rights: *R. v. Ferguson*, 2008 SCC 6 at para. 60. Absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not generally award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional. In other words, invalidity of government action, without something more, does not found an action in damages under s. 24(1): *Mackin v. New Brunswick (Minister of Finance)*: 2002 SCC 13 at para. 78.

[126] The plaintiffs do not attack either the acts of a government official or of those administering the legislation. There is no plea of conduct that is clearly wrong, in bad faith or an abuse of power that would justify an award of damages under s. 24(1). Rather the plaintiffs attack the legislation itself and effectively seek a declaration that it is unconstitutional and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* being schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ("*Constitution Act, 1982")*.

[127] The plaintiffs acknowledge that an action for damages brought under s. 24(1) of the *Charter* cannot, as a general rule, be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*. However, they say that the circumstances in this case are unique and that the alleged breach of fiduciary duty and the Honour of the Crown in conjunction with the enactment of unconstitutional legislation in the form of the NVC is the "something more" that will warrant the court departing from the general rule.

[128] The plaintiffs argue further that, even though the courts are precluded from combining retroactive remedies under s. 24(1) with s. 52 remedies in the absence of "something more", the courts are not precluded from awarding prospective remedies

under s. 24(1) in conjunction with s. 52 remedies: *R. v. Demers*, 2004 SCC 46 at para. 63. They submit that, in the event the NVC is declared unconstitutional, it is possible the court will temporarily suspend the declaration to allow Parliament time to amend it. In such circumstances, courts have awarded prospective remedies under s. 24(1) if the government fails to remedy the legislation within a reasonable time.

[129] I agree with plaintiffs' counsel that, at this stage of the proceeding it would be premature to strike out the s. 24(1) remedy claim as it is not plain and obvious that it will fail.

G. *Canadian Bill of Rights* and *Charter* s. 26

[130] The plaintiffs plead as follows:

> 371. The Plaintiffs and the Class plead that they have been unlawfully deprived of their causes of action arising from the injuries they have suffered.
>
> 372. The Plaintiffs and the Class further plead that property rights at law have traditionally been recognized as a fundamental freedom and that there is a right of the individual to the enjoyment of property and the right not to be deprived thereof, or of any interest therein, save by due process of law.
>
> 374. The Plaintiffs and Class also rely upon the *Canadian Bill of Rights*, which affirms the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law and Section 26 of the *Charter* which stipulates that "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada."

[131] The plaintiffs submit that the enactment of the NVC and the discontinuation of benefits under the *Pension Act* were not done in accordance with due process. They say that the change was "unilaterally imposed during a time of war despite the Social Covenant", notwithstanding the obligations of the Crown to members and veterans of the Canadian Forces.

[132] The plaintiffs maintain that property rights are part of Canada's common law. They note that property rights are recognized in the *Bill of Rights*, which affirms the right of the individual to the enjoyment of property and the right not to be deprived

thereof except by due process of law: *Harrison v. Carswell*, [1976] 2 S.C.R. 200 at 219.

[133] The plaintiffs further submit that these common law rights are protected under s. 26 of the *Charter*.

[134] The plaintiffs also refer to the common law rule that absent clear and unambiguous legislative language to the contrary, courts will order compensation to owners of property expropriated by the state. The plaintiffs seek a declaration that the plaintiffs and members of the class have been unlawfully deprived of their property rights without due process of law contrary to the *Bill of Rights* and s. 26 of the *Charter*. The plaintiffs also seek all orders necessary pursuant to the *Bill of Rights*.

[135] The defendant says the plaintiffs have failed to plead any material facts to support their claims that they have been unlawfully deprived of their property rights under the *Bill of Rights* and s. 26 of the *Charter*. The defendant further alleges that even if material facts were pleaded in support of these claims, it is plain and obvious they have no reasonable prospect of success.

[136] With respect to the *Bill of Rights* claim, the defendant relies on *Authorson v. Canada (Attorney General)*, 2003 SCC 39, where the Supreme Court of Canada held that a court could not compel Parliament to change its legislative procedures based on the *Bill of Rights* and that there is "no due process right against duly enacted legislation unambiguously expropriating property interests" (para. 63).

[137] The defendant argues that s. 26 of the *Charter* does not provide the basis for a stand-alone cause of action. It merely stipulates that the *Charter* does not limit or interfere with any other rights that already exist. Since the plaintiffs have not pleaded that the *Charter* has been applied in a manner that interferes with their existing rights, there is no cause of action that can be maintained.

(a) Bill of Rights

[138] Section 1 of the *Bill of Rights* provides:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> > (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; …
>
> [Emphasis added.]

[139] In *Authorson*, the respondent was a disabled veteran. He was the representative plaintiff for a large class composed of disabled veterans of Canada's military forces. Their claim related to the government's administration of pension benefits on behalf of those who were incapable of managing the benefits on their own. The funds were deposited in the government's general account and tracked as special purpose accounts. The funds were rarely credited with interest even though the government understood that interest was owed. The government only began paying interest in 1990 and sought to limit its liability for past interest by the implementation a federal statute. The impugned provision stated that no claim could be made for or on account of interest on money held or administered by the government prior to January 1, 1990.

[140] The government conceded that it owed each of the veterans a fiduciary duty, that the funds owed to the veterans and administered by the government were rarely credited with interest and that a full accounting was never made. However, the government took the position that it had made that debt unenforceable by legislation. The respondent had argued that several due process rights were guaranteed by the *Bill of Rights*: (i) procedural rights before Parliamentary enactment of law; (ii) procedural rights before the application of a statute to individual circumstances; and (iii) substantive protections against governmental expropriation of property.

[141] The Supreme Court of Canada considered whether the due process protections under s. 1(a) of the *Bill of Rights* guarded against the expropriation of

property by passage of valid legislation. Mr. Justice Major, writing for the Court, rejected the argument that the respondent had the right to due process in legislative process. He found it is a long-standing Parliamentary tradition that the only procedural right due any citizen with respect to proposed legislation is that legislation will receive three readings in the House of Commons and the Senate as well as Royal Assent. Upon the completion of that process, legislation within Parliament's competence is "unassailable" (para. 37). Major J. continued at paras. 40 - 41:

> [40] The submission that a court can compel Parliament to change its legislative procedures based on the *Bill of Rights* must fail. The *Bill of Rights* purports to guide the proper interpretation of every "law of Canada", which s. 5 of the *Bill of Rights* defines to mean "an Act of the Parliament of Canada enacted before or after the coming into force of this Act" (emphasis added). Court interference with the legislative process is not an interpretation of an already enacted law.
>
> [41] Due process protections cannot interfere with the right of the legislative branch to determine its own procedure. For the *Bill of Rights* to confer such a power would effectively amend the Canadian constitution, which, in the preamble to the *Constitution Act, 1867*, enshrines a constitution similar in principle to that of the United Kingdom. In the United Kingdom, no such pre-legislative procedural rights have existed. From that, it follows that the *Bill of Rights* does not authorize such power.

[142] Major J. then considered the procedural rights that exist with respect to the application of the law. He concluded that the *Bill of Rights* guarantees notice and some opportunity to contest a governmental deprivation of property rights in an individualized, adjudicative setting — before a court or tribunal (para. 42). However, he noted that these rights would only arise in context of the revocation of a veteran's benefits when the government no longer believes he or she is disabled. They would not arise in circumstances where the government legislates the elimination of such benefits (para. 44). He drew an analogy to a tax payer being unable to claim procedural protections against a change in income tax rates that adversely affect him or her.

[143] Major J. then considered whether the *Bill of Rights* confers substantive protections against the expropriation of property. He observed that it has long been recognized that Parliament has the right to expropriate property so long as it makes its intention clear. Major J. found that Parliament's expropriative intent as set out in

the impugned legislation was clear and unambiguous (paras. 56 - 57). He further held there is no due process right against legislation that unambiguously expropriates property interests (para. 63).

[144] It is important to recall that no property rights acquired under the *Pension Act* were expropriated by the entry into force of the NVC. The NVC simply limited the property rights that could be granted to Canadian Forces' members and veterans who qualified for compensation after it came into force.

[145] It is not clear whether the Social Covenant created property rights for Canadian Forces' members and veterans, present and future. If it did, there is no specific and unambiguous language in the NVC making it clear that Parliament intended to eliminate those substantive property rights.

[146] In my view, the plaintiffs' claim based upon the *Bill of Rights* is not doomed to fail and is worthy of exploration.

(b) Charter

[147] Section 26 of the *Charter* provides as follows:

> **26.** The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

[148] In *Fraser Health Authority v. Jongerden*, 2013 BCSC 986, the respondent relied on ss. 2(d), 3, 7 and 26 of the *Charter* as well as the general proposition that the government must consult prior to enacting legislation in support of his position that the *Public Health Act Transitional Regulation* was invalid. The court agreed with and adopted the Health Authority's position that s. 26 of the *Charter* could not create a right that the respondent did not already have (para. 165). The court relied upon an excerpt from Professor Hogg's text *Constitutional Law of Canada*, 5th ed. (supp.), loose-leaf (Toronto: Carswell, 2012) at 36-46 - 36-47:

> Section 26 is a cautionary provision, included to make clear that the Charter is not to be construed as taking away any existing undeclared rights or freedoms. Rights or freedoms protected by the common law or statute will continue to exist notwithstanding the Charter. Section 26 does not

> incorporate these undeclared rights and freedoms into the Charter, or "constitutionalize" them in any other way. They continue to exist independently of the Charter, and receive no extra protection from the Charter. They differ from the rights or freedoms guaranteed in the Charter in that, as creatures of common law or statute, the undeclared rights can be altered or abolished by the action of the competent legislative body. As well, the remedy under s. 24 is not available for their enforcement. [Citations omitted.]

[149] Upon a plain reading of s. 26 it is clear that the provision is a safeguard clause, instructing that the *Charter* should not be construed as denying the existence of other rights in Canada.

[150] In my view, it is plain and obvious that the claim for a declaration that the plaintiffs and members of the class have been unlawfully deprived of their property rights without due process of law contrary to s. 26 of the *Charter* fails to disclose a reasonable cause of action and is bound to fail. That portion of the plaintiffs' claim is struck out.

H. *Crown Liability and Proceedings Act* - s. 9

[151] The defendant submits that s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("*CLPA*") bars the action brought by the plaintiffs.

[152] Section 9 provides:

> No proceedings lie where pension payable
>
> **9.** No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[153] The defendant says that the purpose of s. 9 is to prevent double recovery by way of a civil action for damages where a pension or compensation has already been paid. The defendant submits that the "crux" of the plaintiffs' claim is that the quantum of compensation to which they are entitled under the NVC is inadequate. Their claim, the defendant submits, comes squarely within s. 9 of the *CLPA* and it is therefore plain and obvious this action cannot succeed.

[154] The plaintiffs submit that s. 9 of the *CLPA* has no application in this case because their action flows from the enactment of the NVC, not from the compensation received under it. Hence, they say, this is not a case involving potential double recovery. They further submit that the *CLPA* does not exempt pension legislation from *Charter* scrutiny.

[155] The leading case on the interpretation of s. 9 of the *CLPA* is *Sarvanis v. Canada*, 2002 SCC 28. The Supreme Court of Canada considered the issue of whether s. 9 immunized the Crown from tort liability where an individual received benefits under the Canada Pension Plan.

[156] The appellant in *Sarvanis* was an inmate. While he was working in the prison farm's hay barn, he fell through a hidden trap door on the second floor. He was left with permanent injuries and was unable to work. He qualified for CPP disability benefits. He commenced an action in tort against the Crown. The Crown sought summary judgment on the basis that his claim was statute-barred by virtue of s. 9 of the *CLPA*. The application was dismissed by the Federal Court but allowed by the Federal Court of Appeal. It was appealed to the Supreme Court of Canada.

[157] Mr. Justice Iacobucci, writing for the Court, considered whether the use of the phrase "in respect of" in s. 9 was sufficiently broad to encompass the CPP disability benefits granted to the appellant. He acknowledged that the phrase "in respect of" was of broad meaning although not of "infinite reach" (para. 22). Looking at the context in which the phrase had been used, Iacobucci J. found that the ordinary meaning of the words "death, injury, damage or loss" indicates events in respect of which liability could, but for s. 9, attach. He stated at para. 27:

> [27] In both the French and English versions of the statute, the key is to recognize that the loss the recovery of which is barred by the statute must be the same loss that creates an entitlement to the relevant pension or compensation. The enumeration of events as clearly explicates the meaning of "perte" in the French text as it does the meaning of "in respect of" in English.

[158] He held (at para. 28) that the purpose of s. 9 is the prevention of double recovery for the same claim where the government is liable for misconduct but has

already made a payment in respect thereof. The question to be asked is whether the factual basis for both the payment of the "pension or compensation" and for the action is the same.

[159] Iacobucci J. held that the disability benefits under the CPP did not fall within the scope of the ordinary meaning of the words under s. 9. CPP benefits were not contingent on events, but rather, on specific statutory criteria (the disabled condition of a qualified contributor who is under 65 years of age and who makes an application). In order for s. 9 of the *CLPA* to be engaged, the eligibility for the compensation must be "death, injury, damage or loss" (para. 38). The CPP benefits were not being paid for any of those reasons. The Supreme Court of Canada allowed the appeal.

[160] The defendant submits that the British Columbia Court of Appeal's decision in *Sulz v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582 is an example where s. 9 of the *CLPA* was applied to bar claims alleging breach of fiduciary duty where the claims were made on the same facts as those in respect of which compensation was paid. However, that issue was not, in fact, before the Court of Appeal, although a claim in tort brought against the federal Crown was considered in the judgment below (reasons indexed at 2006 BCSC 99).

[161] In *Sulz*, the plaintiff was a former member of the RCMP. She alleged that her immediate supervisor intentionally, or negligently, harassed her to the extent that she became so depressed she had no choice but to accept a discharge. The trial judge found the plaintiff's Veteran Affairs pension was awarded on the same factual basis as the plaintiff's claim in tort against the federal Crown. Both the letter approving the plaintiff's pension and the decision of the Veterans Review and Appeal Board increasing the plaintiff's award mentioned the allegations of harassment. The trial judge concluded the plaintiff's disability arose out of or was in connection with her service in the RCMP, thereby triggering s. 9 of the *CLPA* (para. 98). The provincial Crown was found vicariously liable in the tort of negligent infliction of mental suffering committed by the plaintiff's superior officer. The

provincial Crown appealed that decision, in part, on the basis that the superannuation pension payable upon the respondent's discharge from the RCMP was double recovery. The Court of Appeal held that this benefit was payable because the respondent was discharged, not because she was injured in tort (para. 66).

[162] The defendant also relies on *Dumont v. Canada*, 2003 FCA 475 at para. 73 as support for its argument. In *Dumont*, the appellants were members of the Canadian Forces. Mr. Dumont had been discharged for medical reasons. The Minister of Veterans' Affairs had granted him a disability pension for depression under the *Act* (his disability assessed at 10%) but had declined to extend compensation to cover his claim that he suffered from post-traumatic stress disorder. The appellant Mr. Drolet had also been granted a pension under the *Act* for physical and psychological disabilities, his disability assessed at 60%. Neither appellant had sought review of the Minister's decision before the Veterans Review and Appeal Board. Neither had sought judicial review or reconsideration by the Minister. Both alleged that the respondent contributed to or failed to address the deterioration of their health. Both alleged the respondent's employees or agents were negligent towards them, breaching their legal obligations, their fiduciary obligations and s. 7 of the *Charter*. They appealed the trial-level decisions staying their respective tort claims against the respondent until each had made a formal application for indemnity under the *Pension Act*. The Crown cross-appealed on the basis that the actions should have been struck pursuant to s. 9 of the *CLPA*.

[163] The court held that the appellants' claims for breach of fiduciary duty were, in essence, tort actions that were prohibited under s. 9 of the *CLPA* because the damages claimed were already compensable by way of pension benefits (para. 73). The claims in tort and fiduciary duty were struck. However, the *Charter* claim was allowed to proceed for the following reasons:

> [78] The appellants did not explain in any way how section 7 of the *Charter* has been infringed. However, in the event that the respondent has breached the appellant's rights that are guaranteed by this section, it is far from certain that section 9 of the *Act* can be relied upon to exclude a fair and

> appropriate remedy in keeping with the circumstances. It is up to the judge responsible for applying subsection 24(1) of the *Charter*, to assess whether the pension that might be awarded is appropriate and fair in regard to the circumstances, or if it would be appropriate to add further compensation.

[164] Here, the plaintiffs take issue with the cap placed on financial recovery under the NVC as well as other aspects of the NVC, particularly the "Table of Disabilities".

[165] The reasoning in *Dumont* is apposite in this case with respect to the constitutional claim. It is not plain and obvious that the factual basis upon which compensation is or has been received pursuant to the NVC is the same as the factual basis upon which compensation is claimed in this action. The plaintiffs' claims are in respect of alleged breaches of their *Charter* rights, s. 1 of the *Bill of Rights,* the Crown's fiduciary obligations and the Honour of the Crown. These claims do not relate to the original injuries they suffered in the course of service for which compensation was paid under the NVC.

[166] The plaintiffs also seek general, special and aggravated damages. Those claims similarly relate to the failure of the government to fulfill promises. In my view it is not plain and obvious the claim for damages should be struck.

I. *Statutory Instruments Act* and the Table of Disabilities and Instructions

[167] The *Statutory Instruments Act* provides for the examination, publication and scrutiny of regulations and other statutory instruments:

[168] It provides, in salient part:

> **3.** (1) Subject to any regulations made pursuant to paragraph 20(*a*), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.
>
> (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that
>
> (*a*) it is authorized by the statute pursuant to which it is to be made;

(*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

5. (1) Subject to any regulations made pursuant to paragraph 20(*b*), every regulation-making authority shall, within seven days after making a regulation, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

8. No regulation is invalid by reason only that it was not examined in accordance with subsection 3(2), but where any statutory instrument that was issued, made or established without having been so examined

(*a*) was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, be a regulation, or

(*b*) has, since its issue, making or establishment, been determined by the Deputy Minister of Justice pursuant to subsection 7(2) to be a regulation,

the Governor in Council, on the recommendation of the Minister of Justice, may, notwithstanding the provisions of the Act by or under the authority of which the instrument was or purports to have been issued, made or established, revoke the instrument in whole or in part and thereupon cause the regulation-making authority or other authority by which it was issued, made or established to be notified in writing of that action.

11. (1) Subject to any regulations made pursuant to paragraph 20(*c*), every regulation shall be published in the *Canada Gazette* within twenty-three days after copies thereof are registered pursuant to section 6.

19. Every statutory instrument issued, made or established after December 31, 1971, other than an instrument the inspection of which and the obtaining of copies of which are precluded by any regulations made pursuant to paragraph 20(*d*), shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments.

[169] At paras. 359 to 363 of the amended notice of civil claim, the plaintiffs plead that the Table of Disabilities and instructions are statutory instruments that were not properly registered by the clerk of the privy council, were not published in the

Canada Gazette and were not referred to a Committee of the House of Commons, the Senate or both Houses of Parliament and thereby avoided the scrutiny and review they were required to receive. The plaintiffs also allege that the Table of Disabilities and instructions are invalid because they were not enacted as required by the statute pursuant to which they were made, they constitute an unusual or unexpected use of the authority pursuant to which they were made, they trespass on the plaintiffs' existing rights and freedoms and are inconsistent with the *Charter* and the *Bill of Rights*.

[170] There are several flaws with these pleadings.

[171] First, as the plaintiffs concede, by virtue of s. 51(2) of the NVC, the Table of Disabilities and instructions are exempt from the application of ss. 3, 5 and 11 of the *Statutory Instruments Act.*

[172] Second, by virtue of s. 19 of the *Statutory Instruments Act,* the Table of Disabilities and instructions are deemed to have been referred to a Committee of the House of Commons, the Senate or both Houses of Parliament established for the purpose of reviewing and scrutinizing them. The plaintiffs argue that s. 19 requires real scrutiny, not scrutiny that is merely deemed to have taken place. Nothing in the *Statutory Instruments Act* requires the Committee to undertake a review of each instrument, nor does it make such a review a prerequisite to the valid enactment of the instrument.

[173] Third, the plaintiffs have not pleaded any material facts to support their claim that the Table of Disabilities and instructions are invalid because they were not enacted as required by NVC, constitute an unusual or unexpected use of the authority pursuant to which they were made, trespass on the plaintiffs' existing rights and freedoms and are inconsistent with the *Charter* and the *Bill of Rights*.

[174] Fourth, by virtue of s. 8 of the *Statutory Instruments Act,* no regulation is invalid by reason only that it was not examined in accordance with s. 3(2).

[175] In my view, it is plain and obvious that the pleadings in the amended notice of civil claim related to the *Statutory Instruments Act* disclose no reasonable cause of action and should be struck out.

J. UN *Universal Declaration of Human Rights*, Article 17

[176] The plaintiffs concede that the Universal Declaration of Human Rights has no binding legal effect and plead it only as "a reflection of the normative values of Canadians". No claim is being made under this Declaration.

K. *Canadian Human Rights Act*

[177] The plaintiffs confirm that they are not making a claim under the *Canadian Human Rights Act* and have pleaded it as part of the factual background and legislative scheme that addresses the various rights of injured Canadian Forces members and veterans.

CONCLUSION

[178] To the extent that the amended notice of civil claim is based upon a claim for a declaration that the plaintiffs and members of the class have been unlawfully deprived of their property rights without due process of law contrary to the *Universal Declaration of Human Rights* and s. 26 of the *Charter,* it is struck out.

[179] To the extent that the amended notice of civil claim is based upon a claim that the Table of Disabilities and instructions were enacted without the required scrutiny of Parliament, it is struck out.

[180] To the extent that the plaintiffs' claim is grounded in a public law duty of care it is struck.

[181] The balance of the defendant's application is dismissed.

[182] As there has been mixed success, costs will be in the cause.

"Weatherill J."